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No. 698

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FARMERS CO-OPERATIVE ELEVATOR ASSOCIATION NON-STOCK OF BIG SPRINGS, NEBRASKA a Cooperative Corporation,

Petitioner,

vs.

ARTHUR C. STRAND,

Respondent.

PETITION FOR REHEARING FROM ORDER OF THE SUPREME COURT OF THE UNITED STATES DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH CIRCUIT

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Farmers Cooperative Association Non-Stock Of Big Springs, Nebraska, A Cooperative Corporation, by William Craig and Jess Nielsen, Paul D. Wilson and Jack E. Horsley, Of Counsel, its attorneys herein, hereby respectfully presents to the Court its Petition For Rehearing from the Order of this Court entered December 18, 1967 denying its Petition For Writ of Certiorari. Pursuant to Rule 58 of

the Rules of this Court, your Petitioner presents to the Court what it believes, in good faith, to be additional substantial grounds for granting the Petition For Certiorari available to the Petitioner although not previously presented herein, as follows:

Subsequent to the filing of Petition For Certiorari, the Supreme Court of Nebraska, under the law of which the cause of action here arose, has defined and delineated the substantive law of that jurisdiction beyond what it was at the time of the presentation of the Petition For Certiorari in this Court. The judgment of the U. S. District Court for the District of Nebraska and that of the Court of Appeals, Eighth Circuit, are irreconcilable with the law of the State of Nebraska, as it is now unequivocally defined.

Since Petition for Certiorari was filed in the instant case this Court has filed its decision in C.I.R. v. Estate of Bosch, in which the policy embraced in the Federal Judiciary on the compelling quality of State decisions is enunciated. (87 S.Ct. 1776 [1967].) On Pages 1782-1783 it is said:

> ". . . This Court has held that judicial decisions are 'laws of the . . . . state' within the section . . . . Moreover, even in diversity cases this Court has further held that while the decrees of 'lower state courts' should be 'attributed some weight . . . the decision [is] not controlling . . . ' where the highest court of the state has not spoken on the point . . . This Court further held that 'an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise,*' . . . Thus, under some conditions, federal authority may not be

bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling. This is but an application of the rule of Erie R. Co. v. Tompkins, supra, where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, viz, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authority must apply what it finds to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court . . . (Emphasis added here.)."

To apply that principle as it should be to the case at bar, this Court should give consideration to and follow the holding of the Supreme Court of Nebraska in *Johnson* v. *Goodier,* published October 27, 1967, in Advance Sheets of Nebraska Reports, 182 Neb. 172, ... NW2d.....

This Petitioner respectfully submits that the law of Nebraska is thereby defined, by judicial construction following the filing of the Petition for Certiorari herein, in such terms as to make it inescapable that the Respondent, Arthur C. Strand, assumed the risk of the course of action upon which he engaged and that that risk was a proximate cause of his injuries. Therefore, under the law of Nebras-

ka, the judgments of the District and Circuit Courts are in error and violate the law of the State. The following excerpt from *Johnson* demonstrates this:

> "There is, however, another ground which would require us to arrive at the same conclusion. The petition indicates that, at the time of the accident, plaintiff was walking in a dark and unfamiliar place and did not stop to turn on lights as she proceeded. The following statement found in Prosser on Torts (2nd Ed.) § 77, p. 450, is pertinent here. 'The perils of darkness usually are held to be assumed by one who voluntarily proceeds into it; * * *.' In Wentink v. Traphagen, 138 Neb. 41, 291 N.W. 884, this court held: 'One who voluntarily walks about in total darkness in a strange place must of necessity know that he faces the danger of obstructions, pitfalls, accident, and injury. * * * Darkness alone calls upon a person to exercise greater caution for his own safety than is ordinarily required. * * * Where light has failed, obstructions have been encountered, and there are no especial circumstances requiring a person to proceed, he who goes forward into an unfamiliar dark space does so at his own risk, and if accident and injury follow, he is guilty of negligence, as a matter of law, which bars recovery.' In this case, the plaintiff walked in darkness in an unfamiliar place, encountered a door, opened it, and fell down the stairway. It appears that she, too, was guilty of negligence as a matter of law sufficient to bar recovery."

The Court reversed the judgment and granted a new trial because of error of the same nature, but actually less egregious, than the error in the case at bar.

In addition, we call this Court's attention to another decision of the Nebraska Supreme Court filed on November 24, 1967 in the case of *Kozloski* v. *Modern Litho, Inc.*

in the advanced sheets of Nebraska Reports, 182 Neb. 270 ..... N. W. 2d ..... In this case, the Nebraska Supreme Court considered the duty of a landlord to an invitee on his premises. The Court in its opinion stated as follows on page 274:

> " 'In order to impose liability for injury to an invitee, the dangerous condition must have been known to the owner or occupant or have existed for such time that it was his duty in the exercise of ordinary care to know of it.' 65 CJS, Negligence, § 63 (54), p. 770. See, also, Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N.W. 565. A landowner should not be held liable for defects which an investigation might reveal unless the situation suggests an investigation, and the facts indicate to a reasonable prudent man the likelihood of existence of some hidden danger to persons lawfully on the premises. See England v. Salamon (Mo. App.), 324 S.W.2d 765. 'There is negligence only where no care is exercised to avert a risk to others which reasonably should be apprehended.' Schild v. Schild, 176 Neb. 282, 125 N.W.2d 900. 'Generally speaking, no one is bound to guard against or take measures to avert that which, under the circumstances, a reasonably prudent person would not anticipate as likely to happen.' 38 Am. Jur., Negligence, § 24, p. 669. 'One may not be said to be negligent because he fails to make provision against an accident which he could not be reasonably expected to foresee.' Anderson v. Moser, 169 Neb. 134, 98 N.W.2d 703, 81 A.L.R. 2d 956.
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> "An owner has a legal duty to exercise ordinary care to keep his premises safe for an invitee, but he is not an insurer.. Gorman v. World Publishing Co., 178 Neb. 838, 135 N.W.2d 868.
>
> "The basis of the present action is, in essence, that the defendant failed to inspect his premises, discover the ice in question, and either remedy the situation or

give warning thereof. It hinges entirely on the duty to inspect. When does such a duty arise? It must be borne in mind that this is an action founded upon negligence and as such is subject to the general rules of negligence. In accordance with the rules above set forth, it must, therefore, appear that under the circumstances existing in this case, a person of ordinarily (*sic*) prudence would have taken the precaution of making such inspection. We do not believe that the facts justify such a finding.

"It conclusively appearing that defendant did not have actual notice of the icy condition of which plaintiff complains, and that no circumstances existed which would have put an ordinarily prudent man on notice of the possibility of the existence of such a condition so as to reasonably require an inspection of the premises, it is evident that there is not sufficient evidence to support plaintiff's allegations of negligence, and that defendant's motion for directed verdict or, in the alternative, for a dismissal of plaintiff's petition should have been sustained."

Since the judgments in this case below, and the Order of this Court denying this Petitioner's Petition for Certiorari, "The highest court of the State has (now) spoken on the point * * * (and its) * datum for ascertaining state law * is not to be disregarded by a Federal Court, (there being no) * * persuasive data that the highest court of the State (Nebraska) would decide otherwise." (See Pages 1782-1783, *C.I.R.* v. *Estate of Bosche*, 87 S.Ct. 1776 [1967].)

Unless this Court, in the exercise of its supervisory power, takes jurisdiction of this case and harmonizes the outcome with the established applicable local law, confusion will exist in any case arising in Nebraska involving the doctrine of assumption of risk and, unless this Court intervenes, one rule of substantive law will apply in the

Federal Judiciary in Nebraska and another in the State Courts of that jurisdiction. The resulting uncertainty and dichotomy between the substantive law of the State and the substantive law applied in the Federal Judiciary will have discreditable impact on the administration of justice in this important field of civil rights in that jurisdiction.

In addition to the above compelling reason, two other factors have come into being since the filing of the original petition for a Writ of Certiorari with this Court. In November of 1967, a construction worker was accidentally killed on a sewer ditch project in Lincoln, Nebraska. The Nebraska State Safety Engineer, Ben Zersen, stated that an investigation of the construction site showed a violation of the State Safety Code. A request was made for the issuance of a Complaint because of this violation. Subsequently a question was raised as to the validity of the law and the effect of the State Safety Regulations. The matter was submitted to the Attorney General's office in the State of Nebraska to determine whether or not the Safety Regulations were "an unconstitutional grant of Legislative power to the Labor Commissioner." The Attorney General's office did issue an informal letter opinion to the Department of Labor wherein they found that it was unconstitutional for the Department of Labor to adopt regulations which defined a crime for the reason that it was an unlawful delegation of legislative power to an administrative agency. For this reason, no charges were pressed in the case of the death of the young workman. It should be noted that the opinion of the Attorney General's office reviewed only the criminal aspect, namely, Section 48-434 RRS Neb. 1943. Since there was no formal request for review of the civil aspects of that section of the Statutes, no express opinion was rendered by the Attorney General's office on that aspect. However, the Attorney

General's opinion was based, in great part, on the case of *Lincoln Dairy Co.* v. *Finigan*, 170 Neb. 777, 104 N.W. 2d 227, decided July 15, 1960, wherein the Nebraska Supreme Court held that a grant of power by the Legislature to the Director of the Department of Agriculture under which grant said Director was given the right to promulgate rules and regulations, including that a violation of such rules and regulations would be a criminal offense, was an unconstitutional delegation of legislative power to an administrative authority. Clearly, this demonstrates that the appellant in this case was deprived of his constitutional rights and property by the entry of a judgment based on an alleged violation of Safety Codes which were unconstitutional.

In the original Petition for a Writ of Certiorari, it was pointed out that the Safety Regulations which were presented at the time of trial and which formed the basis of the jury instructions given by the trial Court, were not, in fact, adopted until almost four years after the accident. Subsequent to the filing of the Petition for Writ of Certiorari, the United States Court of Appeals, 6th Circuit, in the case of *Vroman* v. *Sears, Roebuck and Co.*, Case No. 17216, ... F.2d .....,* filed on the 24th day of November, 1967, held that the admission of Safety Specifications was improper. In that case, the plaintiff was allowed to introduce into evidence as evidence of defective design, the American Standards Safety Specifications for power lawnmowers. The admission of these Safety Specifications was held to be improper where they were not formally adopted until some two years after the design and manufacture of

* Not yet nationally reported. Abstracted in Products Liability Report Number 118, Section 5873.

the mower in question. Such a holding is, of course, completely contrary to the holding of the Eighth Circuit in this case, wherein the Safety Specifications were not formally adopted until some four years after the accident in question. This conflict between the Circuits creates confusion in the Federal Courts as well as confusion in the State Court and this confusion must be eliminated.

Conclusion

This Petitioner urges upon this Court reconsideration of its Order denying Petition for Certiorari herein and, because of the existence of substantial additional grounds as stated above, respectfully prays that this Court will reconsider its Order and vacate it and allow Petition for Certiorari and hear and determine the issues of this cause on its merits.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and the petition presents other substantial grounds available to petitioner although not previously presented, and said petition is restricted to the grounds above specified.

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